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PLANNING AGENCY

September 7, 2001

VIA OVERNIGHT DELIVERY

Bill Zumwalt  
Director of Planning and Building Inspection  
Kings County Planning Agency  
Kings County Government Center  
Hanford, CA 93230

Re: Draft Dairy Element of the Kings County General Plan and Program  
Environmental Impact Report

Dear Mr. Zumwalt:

The Sierra Club appreciates the opportunity to comment upon the Revised Draft Dairy Element of the Kings County General Plan ("Dairy Element") and Draft Program Environmental Impact Report ("PEIR") for the Dairy Element. The Sierra Club is a nonprofit corporation organized under California law, with approximately 750,000 members nationwide. The Kern-Kaweah Chapter of the Sierra Club consists of members residing in Kern and Kings Counties, California. Sierra Club is dedicated to exploring, enjoying and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. One of the Sierra Club's national priorities is the protection of the environment, including but not limited to the air, surface water and groundwater, from pollution by concentrated animal feeding operations ("CAFOs").

22-1

The purpose of this letter and the attached documents is to inform the Kings County Planning Agency that the PEIR for the Dairy Element fails to comply with the requirements of the California Environmental Quality Act ("CEQA"), Cal. Pub. Res. Code § 21000 et seq. (West 2001), the CEQA Guidelines, Cal. Code Regs. tit. 14, § 15000 et seq. (2001), and the Kings County Local Guidelines to Implement CEQA, Res. No. 96-048 (1996). In addition, approval of the Dairy Element would render the Kings County General Plan internally inconsistent. We urge the Planning Agency and the Board of Supervisors not to approve the Dairy Element until Kings County has fully addressed the Dairy Element's environmental impacts in a new Program EIR, which is recirculated for public and agency review, and resolved its inconsistencies with the General Plan.

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## I. INTRODUCTION

The California Legislature enacted CEQA to ensure that public agencies "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state." Cal. Pub. Res. Code § 21001(a). Consistent with this intent, the California Supreme Court has declared that CEQA must be interpreted by the courts "to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." Mountain Lion Found. v. Fish & Game Comm'n (1997) 16 Cal. 4th 105, 112, 939 P.2d 1280, 65 Cal. Rptr. 2d 580 (quoting Friends of Mammoth v. Board of Supervisors of Mono County (1972) 8 Cal. 3d 247, 259, 104 Cal. Rptr. 761, 502 P.2d 1049). When a project may have a significant effect on the environment, CEQA requires preparation of an Environmental Impact Report ("EIR") "to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided." Cal. Pub. Res. Code § 21002.1(a); CEQA Guidelines § 15064.

22-3

An EIR is especially valuable as an informational device for proposed agency actions that pose such serious threats to the environment as the Dairy Element. The County has developed the Element "as a comprehensive set of goals, objectives, and policies to guide development, expansion, and operation of milk cow (bovine) dairies within the County." PEIR at 1-1. Even as many states, conscious of the rapidly evolving body of information regarding CAFOs, have enacted various types of moratoria on these animal factories, the Dairy Element would permit a threefold increase in the number of cows in Kings County. At full capacity, the County's dairies would generate more than 25,000 tons of manure each day, and would emit tens of thousands of tons of air pollutants every year in a region already in serious violation of state and federal clean air standards.

As discussed in detail below, the PEIR fails to comply with CEQA in many respects, including but not limited to the following: a) the County illegally exempts future projects from environmental review under CEQA; b) the PEIR fails to achieve the higher level of analysis required of program EIRs contemplating no further environmental review; c) the PEIR fails to explain or justify the county's decision to calculate its theoretical maximum dairy herd without considering air pollutant emissions; d) the PEIR fails to adequately disclose and analyze impacts upon air quality; e) the PEIR fails to evaluate feasible measures to mitigate significant impacts upon air quality; f) the PEIR fails to adequately describe the baseline physical conditions of the county's water resources; g) the PEIR fails to adequately disclose and analyze impacts upon the county's water resources; h) the PEIR fails to evaluate feasible measures to mitigate significant impacts upon water resources; i) the PEIR fails to adequately disclose and analyze impacts upon biological resources; j) the PEIR's mitigation strategies with respect to the potential impact on biological resources are insufficient; k) the PEIR fails to adequately disclose and analyze impacts upon the county's land use and to evaluate feasible mitigation measures; l) the PEIR fails to adequately disclose and analyze impacts upon human health; m) the PEIR fails to evaluate feasible measures to mitigate significant impacts upon human health; n) the PEIR fails to adequately disclose and analyze impacts upon the county's public services and utilities and to evaluate feasible mitigation measures; o) the PEIR's discussion of cumulative impacts is insufficient; and p) the PEIR's analysis of alternatives to the Dairy Element is inadequate.

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Furthermore, adoption of the Dairy Element would render the Kings County General Plan internally inconsistent. The general plan serves as the constitution for all future development within Kings County, and under Gov. Code § 65300.5, the general plan and its elements must "comprise an integrated, internally consistent and compatible statement of policies." The Dairy Element would amend the general plan, yet it is inconsistent with a number of policies and programs contained in the general plan. The requirements of the land use and resource conservation elements of the general plan have not been reconciled with the apparent inconsistencies presented by the Dairy Element, and such inconsistencies would render the proposed amendment void *ab initio* in the event that the County adopts it.

22-5

## II. THE PEIR FAILS TO COMPLY WITH CEQA

### A. The County Illegally Exempts Future Projects from Environmental Review Under CEQA.

Currently, proposals to build or expand dairies are subject to site-specific environmental review under CEQA. The Dairy Element would exempt proposed dairy projects from site-specific environmental review in most instances. According to the PEIR, site-specific environmental review would not occur because approval of such projects by the Zoning Administrator would be ministerial. This approach thwarts the goals of environmental review, informed decision-making and meaningful public participation that CEQA was enacted to promote. Moreover, the PEIR's statement that the Zoning Administrator's actions in approving new and expanded dairies would be ministerial is factually and legally incorrect.

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In several areas of the PEIR, the County announces that it has not addressed particular impacts of the Dairy Element, stating instead that it is deferring such analysis until specific dairy projects are proposed. For example, as discussed below, the County does not accurately describe the County's wetlands and sensitive species, or the potential impact of the Dairy Element on these biological resources. The California Courts have emphasized that deferral of site-specific environmental assessment is acceptable only when the program EIR envisions future environmental review. Pala Band of Mission Indians v. County of San Diego (4th Dist. 1998) 68 Cal. App. 4th 556, 577-78, 80 Cal. Rptr. 2d 294; Rio Vista Farm Bureau Ctr. v. County of Solano (1st Dist. 1992), 5 Cal. App. 4th 351, 373, 7 Cal. Rptr. 2d 307; see also CEQA Guidelines § 15168(c)(1) ("When a subsequent project may result in environmental effects that were not examined in the program EIR, the agency must conduct further environmental review."). Therefore, the County must conduct site-specific review of each future dairy proposal.

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The Dairy Element tries to sidestep this legal obligation by claiming that the site plan review process used to approve new or expanded dairies "is a ministerial act and is not subject to CEQA analysis." Dairy Element at DE-1. However, an agency may not exempt future projects from further environmental review simply by declaring these projects to be purely ministerial. "This argument, if valid, would eviscerate CEQA, a result clearly not intended by the Legislature. The applicability of CEQA cannot be made to depend upon the unfettered discretion of local agencies, for local agencies must act in accordance with state guidelines and the objectives of CEQA." Day v. City of Glendale (2d Dist. 1975) 51 Cal. App. 3d 817, 821-22,

It is not the idle pronouncement of the agency, but the nature of each subsequent project that controls whether further environmental review is required. The judicial standard of review of an agency's decision not to prepare a later site-specific EIR is the "fair argument" standard; a court will not simply defer to an agency's judgment. "[I]f there is substantial evidence in the record that the later project *may arguably* have a significant adverse effect on the environment which was not examined in the prior program EIR, doubts must be resolved in favor of environmental review and the agency must prepare a new tiered EIR, *notwithstanding the existence of contrary evidence.*" Sierra Club v. County of Sonoma (1st Dist. 1992) 6 Cal. App. 4th 1307, 1319, 8 Cal. Rptr. 2d 473 (emphasis added).

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In this case, the County's approval of new and expanding dairies will in most instances be discretionary decisions, for numerous reasons. First, projects that contain both ministerial and discretionary features are treated as discretionary and subject to the requirements of CEQA. CEQA Guidelines § 15268(d); Mountain Lion Found. v. Fish & Game Comm'n (1997) 16 Cal. 4th at 119, 939 P.2d 1280, 65 Cal. Rptr. 2d 580. Even where agency approval involves virtually no discretion, CEQA review is required if the approval "is the only point at which the environmental impact of the project may be publicly considered." Glendale, 51 Cal. App. at 824.

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Second, determinations that must be made "without fixed standards or objectives" are deemed to be discretionary. Glendale, 51 Cal. App. at 823; see also Friends of Westwood, Inc. v. City of Los Angeles (2d Dist. 1987) 191 Cal. App. 3d 259, 271-72, 235 Cal. Rptr. 788 (holding that "relatively general" standards made permit process discretionary). The zoning administrator ("ZA") who will ultimately approve or deny the expansion or construction of dairies in Kings County will be faced with a mountain of complex scientific materials, with little in the way of "fixed standards or objectives" to guide his review. For example, before approving a proposed dairy project, the ZA must find that the Odor Management Plan will "[m]inimize moisture content of stockpiled manure/retained solids to a level that will reduce the potential for release of odorous compounds during storage." Dairy Element at app. J-8. "Relatively general" standards like this one - found throughout the Element - make the ZA's approval process discretionary.

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Third, the Dairy Element provides that "[a]dditional documentation may be required prior to construction to verify that specific requirements will be included in the actual construction." Dairy Element at app. J-3. Where, as here, the approving agency can impose "reasonable conditions" based on "professional judgment," the approval is discretionary. Friends of Westwood, 191 Cal. App. 3d at 272 (citing Natural Resources Defense Council v. Arcata Nat'l Corp. (1st Dist. 1976) 59 Cal. App. 3d 959, 971, 131 Cal. Rptr. 172).

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Fourth, the CEQA Guidelines define a "discretionary project" as one that "requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity . . . ." CEQA Guidelines § 15357. The sheer volume of the technical material that the ZA must review, combined with the additional responsibilities placed on the ZA by the Dairy Element, make it inconceivable that the ZA can responsibly approve or disapprove proposed dairy projects without the exercise of judgment or deliberation. The ZA

22-12

must confirm the adequacy and completeness of a Geotechnical Report, Comprehensive Nutrient Management Plan, Comprehensive Dairy Process Water Disposal Plan, Hazardous Materials Business Plan, Manure Treatment Management Plan, Odor Management Plan, Livestock Management Plan, Irrigation Management Plan, Integrated Pest Management Plan, Dead Animal Management Plan, Wildlife Survey, and Fugitive Dust Emissions Control Plan. Among other tasks, the ZA must also compare the suitability of a proposed new or expanded dairy to the various groundwater and surface water conditions (Policy DE 3.2a), compare the suitability of various types of soils to the requirements of the crops grown by the dairies (Policy DE 3.2b), and confirm that the dairy's requirements for the distribution of wastewater ensures even distribution of nutrients over the crop area (Policy DE 3.2e). Additionally, in the ZA's review of the Manure Treatment Management Plan, the Dairy Element requires the ZA to consult with an expert at the University of California, Davis "to determine whether the MTMP is sufficient." Dairy Element at app. J-7. It is inconceivable that the ZA can fulfill his obligation without using judgment or deliberation.

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If the Zoning Administrator's role were truly ministerial, of course -- if the ZA were expected merely to acknowledge that the requisite reports had been prepared, without any analysis of their completeness or adequacy -- then the County would essentially be rubber-stamping every dairy application it received. The claims made by the dairy operators would be presumed to be accurate, and the reports required by the Element would have little value, undermining the purpose of CEQA. The responsibilities placed on the ZA under the Dairy Element plainly contemplate a role far greater than that of a "rubber stamp."

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Finally, to the extent the County relies on CEQA Guidelines §§ 15064 (h), 15064(i)(3), 15152(f)(2), and 15152(f)(3)(C) in asserting that future projects will not be subject to CEQA review, the County should be aware that the Superior Court for the County of Sacramento has invalidated these provisions. Communities for a Better Env't v. California Resources Agency (Cal. Super. Ct. Apr. 25, 2001) No. 00CS00300, slip op. at 1-2 (attached). In response to this ruling, the California Resources Agency has advised that agencies do not rely upon the invalidated sections. California Resources Agency, CEQA Update (June 2001), at [http://ceres.ca.gov/cra/CBE\\_notice.html](http://ceres.ca.gov/cra/CBE_notice.html). Therefore, a future dairy project may have significant effects that merit review even if the proposed project complies with the requirements of the Dairy Element. Moreover, for future dairy projects that will have significant and unavoidable impacts, the County must revisit its analysis of those effects. Communities for a Better Env't, slip op. at 1-2.

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**B. The PEIR Fails to Achieve the Higher Level of Analysis Required of Program EIRs Contemplating No Further Environmental Review.**

Even if the County could legally exempt all future dairy project approvals from CEQA review, the PEIR plainly lacks the rigorous analysis that would be required. An agency may dispense with the preparation of EIRs for later activities only if the program EIR "contains a thorough analysis of the relevant environmental issues and evaluates the effects of the entire program in a specific and comprehensive manner." 1 Stephen L. Kostka & Michael H. Zischke, Practice Under the California Environmental Quality Act §11.11 (2000); see also CEQA Guidelines § 15168(c)(5). The reason for this is clear: by exempting future projects from

22-15

environmental review under CEQA, a program EIR gives the public its final opportunity to review and comment upon the impacts of all prospective projects that come within the program EIR's scope. "Such detail is required to allow for the 'finely tuned and "systematic" balancing analysis' required by NEPA and CEQA . . . . A less strict approach could undermine the public review function of CEQA." Michael H. Remy et al., Guide to the California Environmental Quality Act (CEQA) 530 (10th ed. 1999).

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In several critical areas, including air quality, water resources, biological resources, and human health, the PEIR's analysis is cursory and its identification of potential effects is wholly inadequate. With such deficiencies, the PEIR fails to meet the high standard that CEQA requires in order to dispense with further environmental review.

**C. The PEIR Fails to Explain the County's Decision to Calculate Its Theoretical Maximum Dairy Herd Without Considering Air Pollutant Emissions.**

The Dairy Element's calculation of Kings County's theoretical maximum dairy herd is critical to the PEIR's assessment of the environmental impacts generated by the Element. The Dairy Element identifies the nitrogen loading capacity of the County's farmland as the principal limiting factor, "based on the County's goal to protect water quality." Dairy Element at DE-8. Neither the Element nor the PEIR explains why emissions of harmful gases and particulate matter were not considered as limiting factors in this calculation. This information is especially relevant considering that (1) the San Joaquin Valley Air Basin is currently in non-attainment of federal and state air quality standards for ozone and particulate matter less than 10 microns in diameter ("PM<sub>10</sub>"), and (2) the PEIR ultimately identifies emissions of PM<sub>10</sub>, reactive organic gases ("ROGs"), hydrogen sulfide, ammonia, and methane as significant and unavoidable impacts on both a project level and a cumulative level. "A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process." Kings County Farm Bureau v. City of Hanford (5th Dist. 1990) 221 Cal. App. 3d 692, 712, 270 Cal. Rptr. 650.

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**D. The PEIR Fails to Adequately Disclose and Analyze Impacts Upon Air Quality.**

*Impacts 4.2-1, 4.2-2: Construction activities and PM<sub>10</sub> and exhaust emissions*

The PEIR fails to make a reasonable effort to quantify and analyze the emissions of PM<sub>10</sub>, ROGs, and nitrogen oxide ("NOx") that would be generated from construction activities. Under CEQA, the PEIR's primary function is as an informational document; the County and the public must be able to comprehend the extent of environmental impact before they can conclude, as the PEIR inexplicably does, that the impacts are less than significant.

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A California Superior Court recently ruled that an EIR for a proposed dairy project in Kern County was inadequate for, among other reasons, failing to adequately assess the project's air quality impacts. See Center on Race, Poverty and the Env't v. County of Kern (Cal. Super. Ct. May 3, 2001) No. 242336, slip op. [hereinafter CRPE]. A copy of the opinion is included with the letter. The court stated, "the EIR itself must detail to the extent possible the significance

22-18

of the [air pollutant] emission so that an informed public may comment upon that information.”  
CRPE, slip op. at 10.

The PEIR fails to substantiate its conclusion that construction activities would have a less-than-significant impact on air quality. By merely citing policies of the Dairy Element (Policies DE 5.1d and 5.1g) that would dictate certain construction practices, the PEIR provides no information about the expected levels of emissions or the policies’ effectiveness in reducing those emissions. “A conclusory statement ‘unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind’ not only fails to crystallize issues but ‘affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives.’” People v. County of Kern (5th Dist. 1974) 39 Cal. App. 3d 830, 842, 115 Cal. Rptr. 67 (quoting Silva v. Lynn (1st Cir. 1973) 482 F.2d 1282, 1285 (citations omitted)).

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#### *PM<sub>2.5</sub> emissions*

Dairy operations contribute to increased levels of fine particulate matter (“PM<sub>2.5</sub>”) in several ways, including exhaust from diesel vehicles and emission of ammonia from manure. The PEIR acknowledges that “[e]xposure to fine particulates has been linked to health problems,” PEIR at 4.2-12. However, the PEIR contains no analysis either of current levels of PM<sub>2.5</sub> in the San Joaquin Valley Air Basin or of the potential increase in PM<sub>2.5</sub> levels from new and expanded dairies. Indeed, the PEIR concedes that “the district is in the process of determining the course of action for PM<sub>2.5</sub>.” Id. Deferral of environmental assessment to a future date directly contradicts one of the central purposes of CEQA: requiring environmental review at the earliest feasible stage in the planning process. Sundstrom v. County of Mendocino (1st Dist. 1988) 202 Cal. App. 3d 296, 307, 248 Cal. Rptr. 352; see Cal. Pub. Res. Code § 21003.1(b) (West 2001). The fact that the federal PM<sub>2.5</sub> standard’s legal status is uncertain should not prevent the County from attempting to quantify and analyze PM<sub>2.5</sub> levels in the air basin. The court in CRPE, finding that “there is no evidence to indicate that there is an inability to quantify the amount of [PM<sub>2.5</sub>] emissions,” ordered the county to estimate the quantity of PM<sub>2.5</sub> that would result from the project and analyze the associated health impacts. CRPE, slip op. at 9-10, 17. The absence in the PEIR of this relevant information, or evidence to indicate that there is an inability to obtain it, renders the PEIR invalid under CEQA.

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#### *Impact 4.2-4: Operation of equipment and exhaust emissions*

The PEIR’s conclusion in this section – that the impact of emissions from the operation of equipment at new and expanded dairies is less than significant – is both legally and factually flawed. The County cannot be permitted to reach this conclusion without quantifying the expected total emissions from agricultural and dairy equipment. Instead of undertaking the required analysis, the PEIR merely states the estimated emissions of ROG, NO<sub>x</sub>, and PM<sub>10</sub> from a single 5,000-cow dairy, and notes that these emissions would not be expected to exceed San Joaquin Valley Unified Air Pollution Control District (“SJVUAPCD”) threshold levels. Instead of disclosing the impacts of a single hypothetical dairy, the PEIR should describe and analyze the collective impacts of all potential dairies that the County may contain under the Dairy Element.

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Using the PEIR's estimates, a dairy of 5,000 milk cows would produce 0.3, 0.4, and 4.6 tons per year of PM<sub>10</sub>, ROG, and NOx emissions from equipment exhaust, respectively. At this rate, dairies housing 244,715 milk cows (the maximum herd permitted by the Dairy Element) could be expected to generate 14.7 tons of PM<sub>10</sub>, 19.6 tons of ROG, and an astonishing 225.1 tons of NOx each year. Yet these figures appear nowhere in the PEIR, violating CEQA's mandate to disclose relevant information that will serve decision-makers and the public alike. See Kings County Farm Bureau, 221 Cal. App. 3d at 712. This section must be revised to comply with CEQA and serve its informational purpose.

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*Impact 4.2-10: Vehicular traffic and air pollutant emissions*

The PEIR does not quantify the potential impact of increased vehicular traffic on air quality and this provides no support for its conclusions that the impact is less than significant. "Conclusory comments in support of environmental conclusions are generally inappropriate." Laurel Heights Improvement Ass'n v. Regents of Univ. of California (1988) 47 Cal. 3d 376, 404, 764 P.2d 278, 253 Cal. Rptr. 426 [hereinafter Laurel Heights]. By stressing that the vehicular traffic associated with any individual dairy will not exceed SJVUAPCD threshold levels, the PEIR also violates CEQA by piecemealing the proposed project and omitting relevant information about the collective impact on air quality of all new and expanded dairies.

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In addition, the PEIR's finding that "[t]he increase in vehicular traffic is considered to be minimal," PEIR at 4.2-77, directly contradicts its determination under Impact 4.9-1 that "[t]ruck and other traffic from new dairy development . . . is a significant impact." PEIR at 4.9-7. The County should revise the PEIR to resolve this contradiction, and must discuss mitigation measures if it determines that this impact is significant.

**E. The PEIR Fails to Evaluate Feasible Measures to Mitigate Significant Impacts Upon Air Quality.**

In addition to the specific sections covered below, the PEIR fails to identify feasible mitigation measures for Impacts 4.2-1, 4.2-2, 4.2-4, and 4.2-10. As discussed above, the PEIR's analysis of these impacts was inadequate, and its determinations of less-than-significant impacts lack substantial evidence. Contrary to the PEIR's conclusions, several of these potential impacts are significant, compelling the PEIR to discuss feasible mitigation measures.

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*Impact 4.2-3: Fugitive dust and PM<sub>10</sub> emissions*

The PEIR concludes that the impact of PM<sub>10</sub> emissions from fugitive dust is significant and unavoidable. However, its consideration of mitigation measures consists exclusively of a list of Dairy Element policies; the PEIR claims that "[n]o additional feasible mitigation measures are available." PEIR at 4.2-60. This cursory discussion is wholly inadequate. An EIR must describe feasible measures that could minimize significant adverse impacts. CEQA Guidelines § 15126.4. The measure described in the attached comments of Alan Gay and the attached report, Dairy Waste Pollution Reduction, are both feasible and capable of reducing dust emissions, and should therefore be adopted. One such measure would be to require new and expanded dairies to house cows in freestall barns instead of unpaved corrals. Freestall dairies would eliminate the

22-23



generation of dust that accompanies unpaved corrals. Despite noting earlier in the report that "[l]ittle to no fugitive dust would be expected to be generated from the freestall barns," PEIR at 4.2-29, the PEIR inexplicably fails to discuss or even identify prohibitions on unpaved corrals as a potential mitigation measure.

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*Impacts 4.2-5 to 4.2-9: Operation of dairies, adverse odors, and emissions*

The PEIR's discussion of mitigation measures for the impacts of adverse odors and emissions of ROG, ammonia, hydrogen sulfide, and methane is inadequate in several respects.

The PEIR fails to explain the reasoning behind the volatile solid ("VS") reduction standard of 50 percent established by Dairy Element Policy DE 5.1c for advanced treatment systems. The PEIR notes that Colorado requires a 60-percent VS removal efficiency. PEIR at 4.2-22. Plug flow digesters have been shown to achieve this 60-percent standard. See Gay comments at 4. Before the County settles for a weaker 50-percent standard, the PEIR must explain why mandating a 60-percent VS reduction is infeasible. "Where several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified." CEQA Guidelines § 15126.4(a)(1)(B) (emphasis added). Without any empirical data or explanatory information to support the selection of this standard, the County and the public cannot properly assess the soundness of the policy, and the PEIR has not satisfied CEQA. See Kings County Farm Bureau, 221 Cal. App. 3d at 712.

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The PEIR neglects to explain why it has not also set treatment standards for emitted gas reductions. The PEIR claims that "[t]reatment effectiveness currently cannot be measured by quantifying the reduction rate of the individual odorous gas compounds because of the lack of available scientific methods to do so." PEIR at 4.2-15. In fact, scientific methods are available; Mr. Gay identifies two of them in his letter. See Gay comments at 3-4. Therefore, the establishment of gas reduction standards is a feasible mitigation measure that the PEIR is required to address. See CEQA Guidelines § 15126.4(a)(1).

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In addition, Policy DE 5.1c contains an exemption from the advanced treatment technology requirement for dairy expansion projects that would not involve constructing new dairy facilities, exceeding the calculated herd capacity, or exceeding SJVUAPCD threshold limits for ROG emissions. The PEIR does not analyze or explain this exemption. It is unclear from the PEIR why only ROG emissions have been selected as the keystone for the MTMP waiver. An EIR that omits relevant information precludes informed decision-making and informed public participation. See Kings County Farm Bureau, 221 Cal. App. 3d at 712. It is environmentally unsound to allow dairies to expand without consideration for the effects on existing waste treatment and disposal systems. See Gay comments at 5-6.

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The PEIR also fails to consider several common best management practices currently in use at dairies to control odors from treated manure. Several of these practices, which include the planting of windbreaks and attention to winds during manure application, are summarized in the attached letter from Mr. Gay. See Gay comments at 4. The County must either require these measures or explain why they are infeasible. Cal. Pub. Res. Code § 20112.1(b).

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Finally, instead of identifying a mitigation measure that will effectively reduce significant impacts upon odor and emissions, the PEIR illegally defers this responsibility. “[A]n environmental assessment, including a statement of mitigation measures, may not be deferred until a future study or project.” Rio Vista Farm Bureau Ctr. v. County of Solano (1st Dist. 1992) 5 Cal. App. 4th 351, 376, 7 Cal. Rptr. 2d 307. Aerobic and anaerobic treatment systems vary in their effectiveness in preventing the emission of particular gases. Merely prescribing a VS reduction standard does not inform the public about the amount of each gas that will be emitted. Under the Dairy Element, which would eliminate environmental review of all new and expanded dairies, the public will have no opportunity to evaluate and comment on the effectiveness of treatment systems that are ultimately selected. This outcome is directly in conflict with the purpose of CEQA.

22-28

**F. The PEIR Fails to Adequately Describe the Baseline Physical Conditions of the County's Water Resources.**

“An EIR must include a description of the physical environmental conditions in the vicinity of the project . . .” CEQA Guidelines § 15125(a). Description of the environmental setting “will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. *Id.* The PEIR fails to adequately describe baseline physical conditions for the county's surface and groundwater resources.

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Surface water quality is an essential component of the environmental setting, yet the PEIR contains no discussion of the current quality of surface waters in Kings County. Such a discussion is necessary for the County and the public to evaluate the impacts on surface water quality of future dairies in the County.

Similarly, the PEIR fails to establish an adequate environmental baseline for groundwater quality in the County. The PEIR must describe environmental conditions “as they exist at the time the notice of preparation is published . . .” CEQA Guidelines § 15125(a). A current baseline for nitrogen and salt concentrations is especially important here, as the Dairy Element's theoretical maximum dairy herd has been determined by the amount of additional nitrogen and salt that the ecosystem can absorb without contaminating groundwater. However, the PEIR relies on one source that is six years old (a 1995 U.S. Geological Survey report) and one source that is incomplete (a 1999 Kings County Planning Agency study that examined only the deeper confined aquifer). In order for the decision makers and the public to assess both the potential impact on groundwater quality and the soundness of the Dairy Element's maximum dairy herd calculation, the PEIR must make a reasonable effort to determine and disclose the current state of groundwater quality.

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**G. The PEIR Fails to Adequately Disclose and Analyze Impacts Upon the County's Water Resources.**

*Impact 4.3-1: Construction runoff*

The PEIR does not quantify or analyze the potential impacts to water quality of runoff associated with construction activities. This section of the PEIR merely discusses the general

22-31

impacts of construction activities on water quality, without any reference to the projected activities or environmental setting in Kings County.

The PEIR also contains no explanation of how implementation of existing regulations, including Storm Water Pollution Prevention Plans ("SWPPPs") for construction activities, would reduce the potential impact to a less-than-significant level. By failing to substantiate its conclusion, the PEIR does not comply with CEQA. See County of Kern, 39 Cal. App. at 842.

*Impact 4.3-2: Modification of surface water drainage patterns and migration of runoff*

The PEIR contains no quantification or analysis of the potential impacts associated with the alteration of drainage patterns caused by the construction or expansion of dairies in the County. This section of the PEIR plunges immediately into a discussion of the policies that would reduce potential impacts, without ever identifying what those impacts might be. Without at least citing the potential environmental impacts, the PEIR cannot properly claim under CEQA that conformance with existing regulations and policies would reduce those impacts to a less-than-significant level. This section also offers no analysis of how the County reached this conclusion, which is impermissible under CEQA. See Laurel Heights, 47 Cal. 3d at 404.

In addition, the PEIR fails to explain how the County selected 150 feet as the "appropriate setback" between manured areas and wells or surface water bodies, under Policies DE 3.2c and 4.1a.2.i. The PEIR also neglects to discuss the projected effects of this setback requirement. The PEIR only notes that the setback exceeds the California Well Standards, which require a minimum setback of 100 feet between water wells and an animal enclosure. PEIR at 4.3-39. It is difficult for the County and the public to evaluate the effectiveness of this setback without any information concerning how the particular distance was chosen, or how it might reduce the migration of runoff. Furthermore, merely identifying compliance with a standard is not an adequate substitute for CEQA analysis. Communities for a Better Env't, slip op. at 1-2 (invalidating CEQA Guidelines § 15064(h)).

*Impact 4.3-4: Flooding and water quality*

The Dairy Element permits the application of manure and dairy process water within flood zones, except during flooding or threats of flooding. The PEIR fails to account for unanticipated flooding, however. It contains no discussion of the potential impacts to surface water quality that would result from the unanticipated flooding of fields where manure has previously been applied.

*Impact 4.3-5: Operation of dairies and surface water quality*

The PEIR neglects to analyze the impacts to surface water quality from atmospheric fallout of nutrients such as ammonia and nitrogen. The PEIR states only that impacts are "difficult to measure," PEIR at 4.3-21, without putting forth any evidence to suggest why measurement might be difficult. The PEIR goes on to claim that the areas receiving the highest levels of fallout – those nearest the dairies – would "in general" be in cultivated agriculture and "may benefit from the nutrient input." However, the PEIR contains no data or analysis to

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support these assertions, making it difficult for either the County or the public to evaluate the PEIR's conclusions.

The PEIR next claims, without any explanation, that the impact to surface water quality of distant water bodies from atmospheric fallout would be less than significant, because of "mitigation measures designed to reduce emissions of nitrogen-containing compounds" contained in Section 4.2 of the PEIR. PEIR at 4.3-21. However, the portion of the Air Quality section that discusses ammonia emissions, Impact 4.2-7, concludes that the potential impact upon air quality from ammonia emissions remains "significant and unavoidable," even after implementation of identified mitigation measures. PEIR at 4.2-73. Furthermore, a growing body of scientific literature has discussed the precipitation of airborne ammonia and its effect on water quality. Abstracts that address this topic are attached to this letter.

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The PEIR offers no explanation or evidentiary support for its determination that a significant impact to air quality becomes a less-than-significant impact upon surface water quality. Without this analysis, the PEIR has not served its purpose as an informational document under CEQA. See County of Kern, 39 Cal. App. at 842.

Finally, the PEIR relies in part on Policy DE 4.1b, which establishes requirements for manure management, to claim that the potential impacts to surface water quality are less than significant. Policy DE 4.1b.A requires that dairy owners use nutrient management to "prevent the application of nutrients at rates that will exceed the capacity of the soil and planned crops to assimilate nutrients, and will reduce the potential for degradation of water resources." Neither the Dairy Element nor the PEIR identifies any guidelines or standards by which this nutrient balance is to be achieved. The CEQA Guidelines state that "[f]ormulation of mitigation measures should not be deferred until some future time" unless they "specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way." CEQA Guidelines § 15126.4(a)(1)(B).

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As a result of each of these omissions, the PEIR's finding that implementation of existing regulations and Dairy Element policies would reduce potential impacts to surface water quality to a less-than-significant level lacks adequate support, in violation of CEQA. See Laurel Heights, 47 Cal. 3d at 404.

*Impact 4.3-6: Depletion of water resources*

In its discussion of dairy facility water use, the PEIR notes that overdraft of local groundwater supplies could result from siting new dairies in areas that, because of insufficient water supply, cannot support selected crops. The PEIR claims that the potential impact is rendered less than significant by Policy DE 3.2h, which would require a Hydrogeologic Sensitivity Assessment ("HSA") in two areas with limited water supplies, Kettleman Plain and Sunflower Valley. However, neither the Dairy Element nor the PEIR addresses the potential of overdraft in other areas - areas that currently have adequate water supplies but in the future might become incapable of supporting crops. The PEIR should consider this impact and either explain why it is less than significant or propose feasible mitigation measures.

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Furthermore, with respect to cropland water use, the PEIR does not address the potential impacts of a substantial increase in the amount of double-cropped lands within the County, which would require an increase in water use for irrigation. The PEIR admits that such an increase could potentially result in a significant impact on local groundwater supplies, but assumes that cropping patterns will remain similar to existing conditions because of the Dairy Element's maximum herd size methodology. This conclusion presupposes, without explanation, that the only rationale for shifting to double-cropping would be to accommodate more dairy-generated manure. The PEIR ignores the possibility that dairy owners might change their cropping patterns to achieve other objectives, such as increasing the annual crop yield, improving the organic matter level of the soil, or reducing soil erosion. The PEIR fails as an informational document by neglecting to consider the potential impacts of increased double-cropping and to propose feasible mitigation measures.

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*Impact 4.3-7: Increased rate of salt and nitrogen loading and groundwater quality*

The stated impetus behind the Kings County General Plan is to promote the development of large dairies, especially those seeking to relocate from the Chino Basin of southern California. PEIR at 3-2 to 3-3. It is noteworthy that the PEIR refers to the Chino Basin, which contains the highest concentration of dairies in the world, according to the attached study by the California Regional Water Quality Control Board. The Regional Board's study chronicles the degradation of water quality in the Basin, including alarmingly high nitrate and salt levels, and describes the significant contribution of dairies to the problem. Considering the existing evidence of water contamination that results from large dairy operations, to dismiss the impact on groundwater of a potential threefold increase in the number of cows in Kings County as less than significant is insupportable. The PEIR fails to adequately assess this impact in several respects.

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The PEIR does not adequately analyze the volume of seepage through the soils that line wastewater lagoons, the quantity of pollutants that would escape, or the speed at which they would reach groundwater. When a PEIR fails to include relevant information, it impairs informed decision-making and informed public participation, and a prejudicial abuse of discretion occurs. Kings County Farm Bureau, 221 Cal. App. 3d at 712. The PEIR merely refers to Policy DE 4.1a.B.2.c, which would require that the rate of seepage not exceed  $1 \times 10^{-5}$  cm/s. In fact, an expert retained by the Sierra Club in connection with the proposed Borba Dairy in Kern County calculated this rate to be equivalent to *9,236 gallons per acre per day* – even without any failure of the lagoons. See Kathy J. Martin, P.E., "Lagoon Seepage and Mass Loading of Pollutants: Calculations for the Borba Dairy, Kern County, California" (July 2000) (attached). Multiplying this seepage rate by the total surface area of lagoons required to accommodate the County's theoretical maximum herd yields an astronomical seepage figure – one that would allow 230 pounds per day of nitrogen alone to infiltrate to groundwater. See Gay comments at 1. However, these figures – in a form comprehensible to the general public – appear nowhere in the Dairy Element or the PEIR. "Informed public participation" is one of the principal statutory goals of the EIR process. Kings County Farm Bureau, 221 Cal. App. 3d at 712. In its CRPE opinion, the Kern County Superior Court held that this same practice – reporting the seepage rate for a proposed dairy's lagoons in centimeters per second – violated CEQA: "When one has to be familiar with mathematic formulas to understand significant information, the EIR does not accomplish one of its requisite goals." CRPE, slip op. at 16 n.1.

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Calculation of the volume of seepage from future lagoons is critical to the County's and the public's ability to understand the severe environmental impacts of the Dairy Element and analyze the sufficiency of proposed mitigation measures.

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The PEIR should also have considered the possibility of mandating the use of impermeable synthetic membranes to line dairy lagoons, which would dramatically reduce impacts to groundwater. See Gay comments at 7 ("salt loading from stored wastewater would be cut 99%"). The attached article from the journal Environmental Health, "Dairy Feedlot Contributions to Groundwater Contamination," attests to the superiority of synthetic liners over clay liners.

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The PEIR bases its determination of a less-than-significant impact in part on the Dairy Element policies that concern monitoring and response action. Policies DE 6.2a, 7.1b, and 8.1c provide only that, in the event a dairy exceeds its parameters, possible response actions include reductions in herd size, measures to balance nutrient management, or coordination with the dairy monitoring office "to solve problems in a timely manner." PEIR at 4.3-38. The Dairy Element should prescribe safeguards and treatment methods in the event that salinity does increase significantly. See Gay comments at 7.

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Moreover, the PEIR fails to consider the cost of treatment and cleanup in the event that pollution from dairies degrades the quality of the County's groundwater. The first of three desalters installed to remediate severe groundwater contamination in the Chino Basin cost the State of California \$58.3 million, and constructing the other two desalters will raise the total price tag to approximately \$100 million for installation alone. John H. Orr, Facility Ready to Start Treating Chino Basin Water, Business Press, Mar. 6, 2000, at 5. Dairy operators should be held financially responsible for the treatment or cleanup of groundwater contaminated by their operations. However, nowhere in their discussion of response measures do the Dairy Element or PEIR ensure that funds will be available to treat or clean up degraded water supplies. Without addressing this issue, the PEIR cannot properly claim that the impact on groundwater quality is less than significant. See CRPE, slip op. at 13-14 (ordering county to consider issue of remediation costs).

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Finally, the PEIR claims that Policies DE 6.2a, 7.1b, and 8.1c "indicate that the Kings County Planning Agency would be empowered and willing to modify or revoke the [Site Plan Review] approval or use permit of any and all dairies operating under the Element that do not meet the requirements established by the Element to protect groundwater quality." PEIR at 4.3-38. None of these three policies refer to modification or revocation of any agency approval or permit. Therefore, this claim lacks adequate support in violation of CEQA, as does the subsequent, cursory claim that "[t]his appears to be an appropriate mechanism for enacting change if an impact is identified." See County of Kern, 39 Cal. App. at 842.

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*Impact 4.3-8: Existing wells and pollutant migration to subsurface*

As discussed under "Impact 4.3-2," above, the PEIR fails to explain how the County selected 150 feet as the "appropriate setback" between manured areas and wells or surface water bodies, under Policies DE 3.2c and 4.1a.2.i. Understanding both the rationale behind this

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requirement and its effect is critical to an evaluation of the PEIR's conclusion that the potential impact of pollutant migration into wells is less than significant.

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Furthermore, after observing that poorly constructed or damaged wells in the vicinity of dairies pose a threat to water quality, the PEIR declines to make a reasonable effort to assess and disclose the current state of water wells in Kings County. Instead, the County illegally defers this assessment until a proposal exists for a new or modified dairy site. The purpose of an EIR is to assess environmental impacts *before* a project proceeds; the PEIR's failure to do so precludes informed decision-making and public participation. See Kings County Farm Bureau, 221 Cal. App. 3d at 712.

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**H. The PEIR Fails to Evaluate Feasible Measures to Mitigate Significant Impacts Upon Water Resources.**

The PEIR concludes that none of the potential impacts to water resources are significant. However, as discussed above, the PEIR reaches this conclusion without establishing a current baseline for water quality, conducting an adequate analysis of the potential impacts it identifies, or addressing several additional impacts that are potentially significant. Considering these deficiencies, the PEIR's failure to discuss feasible mitigation measures to protect water resources violates CEQA.

22-48

**I. The PEIR Fails to Adequately Disclose and Analyze Impacts Upon Biological Resources.**

The PEIR contains inadequate information concerning Kings County's biological resources and thus fails in its duty to serve as the basis for informed decision-making and public policy. While the PEIR asserts that surveys of the area's biological resources will be conducted in the future, CEQA does not permit deferral of environmental analysis to a future date. As one court explained, "an environmental review deferred is an environmental review denied." Save Our Forests and Ranchlands v. County of San Diego, No. 676630, slip op. at 5 (Aug. 31, 2000).

The County should conduct biological surveys before it adopts the Dairy Element. Without that information, it is impossible for decision-makers and the public to apprehend the extent of the Dairy Element's impact on those resources. See Santiago County Water District v. County of Orange 118 Cal. App. 3d 818, 831 (1981) ("an EIR should be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences."); see also CEQA Guidelines § 15150; Stanislaus Natural Heritage Project v. County of Stanislaus 48 Cal. App. 4th 182 (1996).

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A description of the environmental setting is the starting point for environmental impact analysis. The Kings County PEIR's discussion of the environmental setting is flawed with regard to the county's biological resources. CEQA Guideline § 15125 states that an EIR must include a discussion of both the local and regional environmental settings. Furthermore, "[s]pecial emphasis should be placed on environmental resources that are rare or unique to that region and would be affected by the project. The EIR must demonstrate that the significant

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environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context." CEQA Guidelines § 15125(c). The Kings County PEIR fails to discuss the regional environmental setting beyond the boundaries of Kings County, and its consideration of rare or unique resources is severely limited. The PEIR also relies on outdated and incomplete data.

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Because the PEIR fails to adequately describe the Court's existing biological resources, including the presence of rare and sensitive species and their habitat within the areas affected, the PEIR also fails to adequately assess the impact of the Dairy Element on those resources. For example, the PEIR states that there will be no significant impacts related to loss and modification of wetlands. However, without information about the nature and extent of wetlands within the area affected, the PEIR's statement amounts to a bare conclusion without supporting analysis.

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The PEIR illegally defers analysis of the Dairy Elements impact on wetlands. The PEIR states that when new and expanded projects are proposed, "a detailed wetland assessment would be required" to determine whether wetlands are present. By postponing the assessment to a future date, the PEIR deprives the public of information needed to apprehend the extent of the Dairy Element's impact on wetlands.

Additionally, the PEIR illegally defers analysis of the Dairy Element's impact on sensitive species. While the PEIR acknowledges that historic occurrences of rare, threatened, and endangered species have been reported in Kings county, the report only states that "further detailed surveys would be necessary to confirm the presence or absence of special-status animals," without any explanation of why such studies are not included in the PEIR or why it may not be feasible to conduct such studies at present. PEIR at 4.4-5. The PEIR claims that construction and operation of dairy facilities on existing agricultural fields "would not result in significant impacts on biological resources," yet the PEIR contains no evidence to support such a statement. In fact, the description of the kit fox habitat flatly contradicts this claim. The PEIR states that the kit fox "generally inhabit grazed, non-irrigated grasslands, but live next to and forage in tilled or fallow fields, irrigated row crops, orchards, and vineyards." PEIR at 4.4-5. These are exactly the areas contemplated for future dairy use by the Dairy Element, and thus the PEIR's statement that there would be no significant impacts on the kit fox is unsupported, especially since the PEIR acknowledges that the status of the kit fox within these habitats has been "poorly documented." PEIR at 4.4-5

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The PEIR also fails to explain why certain areas are to be presumptively excluded from future study of potential impacts. Dairy Element Policy DE 1.2e states that "land that has been continuously cultivated since 1985, or before, is presumed not to qualify as wetland or habitat" and also presumes that "temporarily" fallow land is presumed not to provide habitat, without defining "temporary." The PEIR does not explain or justify these assumptions.

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The PEIR section on biological resources also contains an ambiguous sentence that makes no sense. PEIR 4.4-8 reads: "The potential for occurrence of special-status species on natural habitat, or the indirect effects (e.g., additional nighttime light and glare) of potential development adjacent to sensitive habitat." Something is missing from this sentence.

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**J. The PEIR Fails To Adequately Disclose and Analyze Impacts Upon Human Health.**

Identification of significant environmental impacts is one of the primary purposes of the EIR and is necessary to ensure that public agencies do not approve projects if there are feasible mitigation measures available to reduce or avoid the environmental impacts. An EIR must set forth the factual and analytical bases for its conclusions and must provide reasons for a determination of insignificant impacts. Furthermore, judgments on significance of impacts must be based on scientific evidence and other evidence to the extent possible. In its analysis of the potential impacts to human health that would result from the Dairy Element, the PEIR fails to support its conclusion that impacts would be less than significant.

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*Impact 4.8-1: Worker exposure to hazardous materials*

The PEIR finds that this is a less than significant impact because there are regulations in place that minimize agricultural workers' exposure to pesticides and other hazardous materials. However, such regulations do not apply to dairy workers, and the PEIR merely states that similar regulations would be established to protect dairy workers without explaining when or how this will occur. The PEIR also claims that the potential for dairy worker exposure to hazardous materials would be similar to that encountered by farm workers. Before claiming that the impact of exposure to hazardous materials would be rendered insignificant by regulations aimed at protecting worker safety, the County should have protective regulations in place that will minimize the particular impacts associated with the dairy industry.

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The PEIR states that the Dairy Element specifically addresses the problem of worker exposure to hazardous materials, yet the language of the element merely states an objective of protecting worker health and a policy of compliance with applicable laws and regulations, without any further elaboration. Dairy Element Objective 4.3 and Policy DE 4.3a. The PEIR does not explain how this objective will be achieved.

*Impact 4.8-3: Operation of dairies and increased vector activity*

The PEIR claims that the impact of an increase in mosquito, fly, and rodent populations is a less than significant impact. The PEIR refers to Policy DE 4.3b of the Dairy Element, which requires development and implementation of an Integrated Pest Management Program by dairies. However, neither the PEIR nor the element makes any reference to the standards that would guide the approval of such plans. The PEIR also refers to Policy DE 4.3c, which requires dairy operators to comply with the guidelines of the Kings Mosquito Abatement District ("KMAD"), yet again, neither PEIR nor the Element assesses the adequacy of the KMAD's guidelines in light of the potential increases in vector activity. The PEIR also fails to make any projections regarding the potential increase in vector infestation that would result from expansion of dairy operations in Kings County.

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*Impact 4.8-4: Operation of dairies and pathogens*

The PEIR fails to adequately assess the impacts of pathogen transmission and increased

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antibiotic use that would result from the Dairy Element.

Livestock manure contains many pathogenic microorganisms, and the application of these wastes to land creates the potential for environmental contamination. Protozoan pathogens may present the greatest threat to public health since they are often resistant to current methods of water treatment. A number of factors may affect the potential degree of pathogenic pollution, including soil PH, temperature, plant life, microbial surface properties, soil type and water content and flow, and slope.

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The PEIR also fails to adequately consider the potential health effects of cryptosporidium parvum on dairy workers. Cryptosporidium is a protozoal parasite that is shed by humans, cattle, and other animals. It can be transmitted from animals to humans and it has a very low infectious dose for humans. Livestock shedding is usually limited to the first six months of life, though European researchers have also reported shedding of cryptosporidium in adult beef cattle. Infants and young children are especially vulnerable to cryptosporidiosis.

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The PEIR recognizes that "the distances pathogens can travel in various hydrogeological environments are not well-defined," yet the element only establishes a setback of 150 feet between wells and "potential sources of pollution." The PEIR also does not note whether manure-covered crop areas within the NSOZs are to be included within the definition of "potential sources of pollution" or whether the definition would only apply to the dairy sites.

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The PEIR does not mention the effects of antibiotic use for livestock on human health. Intensive use of antibiotics on livestock can result in the contamination of water systems. While humans generally only take antibiotics for therapeutic purposes, livestock animals are kept on steady diets of antibiotics throughout their lifespans. Large livestock operations often keep animals in crowded, dirty pens and rely on low doses of antibiotics to keep diseases at bay. Antibiotics are also regularly given to healthy animals to promote growth. Such constant dosing encourages the development of drug-resistant microbes, with the result that ever-increasing amounts of antibiotics are used. Because antibiotics are not fully metabolized in the digestive system, they end up being excreted. Discharge of antibiotic laced manure to surface and ground water may result in human exposure. The attached studies and articles highlight some of the problems associated with highly concentrated use of antibiotics within livestock populations. A recent study by the University of Illinois has traced genes resistant to the antibiotic tetracycline as far as a sixth of a mile downstream from two swine facilities that used the antibiotic to promote growth. The PEIR's failure to assess the impact to the environment and public health of the increased antibiotic usage that would result from the increased number of cows contemplated violates the informational requirements of CEQA.

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*Impact 4.8-5: Residual manure and levels of methane and nitrate*

The PEIR relies on an MTMP as a basis for its finding that exposure to residual manure is a less than significant impact. However, such reliance is misplaced, given that Policy DE 5.1c, requiring submission of MTMPs by new or expanding dairies, is itself illegally vague.

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**K. The PEIR Fails to Adequately Disclose and Analyze Impacts Upon the County's Public Services and Utilities and to Evaluate Feasible Mitigation Measures.**

*Impact 4.10-1: Increases in water consumption*

The PEIR fails to analyze the potential impacts upon water supply in two respects. First, the PEIR does not address the potential of overdraft of water supply in an area that is currently arable but in the future might become incapable of supporting crops. Second, the PEIR neglects to consider the potential impacts of a substantial increase in the amount of double-cropped lands within the County, which would require an increase in water use for irrigation.

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**L. The PEIR's Discussion of Cumulative Impacts is Insufficient.**

CEQA requires a discussion of the expected cumulative environmental effects produced by past, present and future projects and a reasonable analysis of the cumulative impacts. CEQA Guidelines §§ 15130(b)(2), 15130(b)(3); Kings County, 221 Cal. App. 3d at 729. In order to complete this analysis, the lead agency should "attempt in good faith to fulfill its obligation under CEQA to provide sufficient meaningful information regarding the types of activity and environmental effects that are reasonably foreseeable." Stanislaus Natural Heritage Project, 48 Cal. App. 4th at 206. The Kings County PEIR includes no such comprehensive summary of the cumulative impacts of the projected increase in Kings County dairies.

By limiting the scope of its cumulative impacts analysis to Kings County, the PEIR violates CEQA. In Kings County, *supra*, the Fifth District Court of Appeals rejected an EIR in which the City of Hanford had limited the scope of cumulative air quality impacts to the Mid-San Joaquin Valley instead of the entire San Joaquin Valley Air Basin. The court held that, given the reasonable availability of relevant information on the entire air basin, the limited scope of the EIR rendered it inadequate. See Kings County, 221 Cal. App. 3d at 723-24.

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The Dairy Element PEIR suffers from the same deficiency pointed out in Kings County by ignoring the air quality impacts of related projects outside Kings County but within the same air basin. The County cannot excuse its failure to conduct a proper cumulative impacts analysis. Data on past, present and future dairy operations is available. The PEIR gives no reason why it would have been infeasible to collect relevant data on regional impacts from readily available sources of agricultural information, such as the USDA Extension Service, the University of California agricultural programs or the other county governments in the San Joaquin Valley Air Basin.

A county may not omit data from its cumulative impacts analysis because it feels it would be too expensive to collect. Citizens to Preserve the Ojai v. County of Ventura (1985) 176 Cal. App. 3d 421. In Citizens to Preserve the Ojai, the County relied on an outdated and incomplete air study in its analysis of cumulative impacts, claiming that it would be too costly to collect current data. The court held that the EIR was insufficient because it had omitted data that was necessary to make an informed decision, despite the cost.

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Similarly, Kings County is required to conduct an analysis to make an informed decision as to the severity of the impacts from a substantial increase in the number of large-scale CAFOs. Without the factual data necessary to make an informed decision, the Kings County PEIR cannot be approved under CEQA. See Kings County, supra, 221 Cal. App. 3d at 724 ("Because the record does not provide information regarding similar energy developments in the San Joaquin Valley air basin, the agency could not, nor can we, determine whether such information would have revealed a more severe impact. Accordingly, the EIR is inadequate.")

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**M. The PEIR's Analysis of Alternatives to the Draft Dairy Element is Inadequate.**

The PEIR's discussion of alternatives fails to comply with the requirements of CEQA. The PEIR discusses four alternatives: a "no project" alternative, ten percent and fifty percent reduced herd sizes, and an Increased Manure Treatment alternative. However, this discussion is inadequate in several respects. First, the range of alternatives discussed in the PEIR is insufficient. Second, the PEIR fails to analyze even its inadequate range of alternatives adequately. Third, the PEIR fails to explain why the fifty percent reduced herd size is not proposed for adoption as a feasible alternative which substantially lessens the significant impacts of the proposed project.

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According to CEQA Guideline §15126.6, an EIR must "describe a range of feasible alternatives... which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." The PEIR fails to properly analyze alternatives that would actually reduce the adverse unavoidable impacts of the proposed Dairy Element. Except for the fifty percent reduced herd size alternative, none of the other proposed alternatives meet the standard of avoidance or substantial lessening of environmental impact that is required by CEQA.

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Far from discussing a reasonable range of environmentally beneficial alternatives, the PEIR identifies only one, the fifty-percent herd reduction. For example, the PEIR deems the ten percent reduction in herd size to be of minimal environmental benefit and therefore unworthy of serious consideration. If the ten percent reduced herd size alternative fails to either avoid or substantially reduce the proposed projects significant effects, it should not have been included as an alternative. The County cannot discharge its CEQA duties by setting up meaningless, "straw man" alternatives that merit no detailed evaluation. A broader range of environmentally beneficial alternatives should be evaluated in a revised, recirculated PEIR.

The very truncated discussion of the comparative effects of alternatives in the PEIR further undermines the usefulness of the document. Another deficiency in the alternatives analysis results from the myriad flaws in the EIR discussed above in this letter. The data gaps and inadequacies in the PEIR's discussion of environmental setting, impacts and mitigation carry over and limit the usefulness of the PEIR's discussion of alternatives.

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### III. APPROVAL OF THE DAIRY ELEMENT WOULD RENDER THE KINGS COUNTY GENERAL PLAN INTERNALLY INCONSISTENT

Each city and county is required to adopt a long-term general plan that serves as a guiding document for future development. The intent and purpose of a general plan should be accommodation of growth without a loss of quality of life. The general plan is, "in short, a constitution for all further development." O'Loane v. O'Rourke (1965) 231 Cal. App. 774, 782, 42 Cal. Rptr. 283. The propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements. Although a general plan is not immutable, it "may not be trifled with lightly." Citizens of Goleta Valley v. Board of Supervisors, (1990) 52 Cal. 3d 553, 570.

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General plans are subject to the requirement of internal consistency: "the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency." Cal. Gov. Code § 65300.5, see also Sierra Club v. Kern County Board of Supervisors (1981) 126 Cal. App. 3d 698, 179 Cal. Rptr. 261. A city or county can adopt a specific plan to implement its general plan in a particular geographical area, Cal. Gov. Code § 65450, but the specific plan must still be consistent with the general plan. Cal. Gov. Code § 65454. Likewise, all zoning ordinances must be consistent with the general plan, Cal. Gov. Code § 65860(a), and conditional use permits must also meet the requirement of consistency. See Neighborhood Action Group for the Fifth District v. County of Calaveras (1984) 156 Cal. App. 3d 1176, 1184, 203 Cal. Rptr. 401. The proposed Dairy Element would render the Kings County general plan internally inconsistent, and as a result its adoption would violate state law.

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"The law requires zoning ordinances to be consistent with the county's general plan, and the general plan is required to be consistent within itself." Sierra Club v. Kern County Board of Supervisors, 126 Cal. App. 3d at 703. No single element of a general plan may be allowed to take precedence over the other elements. Under the applicable California Government Code Guidelines, the "internal consistency requirement" has several important implications that relate to the structure and content of a general plan: "First, it implies that all elements of the general plan have equal legal status. For instance, the land use element and the open-space element cannot contain different land use intensity standards rationalized by statements such as 'if in any instance there is a conflict between the land use element and the open-space element, the land use element controls.' Because the open-space element is not legally subordinate to the land use element, any conflicts between the two must be resolved within the general plan itself." Quoted in Sierra Club v. Kern County Board of Supervisors, *Id.* at 708.

The proposed Kings County Dairy Element is inconsistent with the County's general plan in several respects. Such inconsistencies would render the proposed amendment void *ab initio* were the county to attempt to adopt it. Under CEQA, the PEIR is supposed to "discuss any inconsistencies between the proposed project and applicable general and regional plans." CEQA Guideline § 15125(b). The Dairy Element PEIR fails to discuss the inconsistencies that would result from adoption of the proposed element.

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The introduction to the General Plan states that "The local economic base will likely continue its slow shift from primarily agriculture to increasing retail trade and service jobs. Job opportunities must be developed in these sectors to meet the needs of a growing local population." General Plan at I-4. One of the assumptions listed in the introduction to the General Plan is that industrial and commercial activities will grow in economic importance, even though agriculture will remain "the basic economic mainstay of the region." General Plan at I-5. Under the proposed Dairy Element, the county is insuring that dairy production will continue to be the predominant economic activity in the county. By adopting the Dairy Element, the county would be turning its back on the needs of its citizens to serve the interests of increasingly concentrated dairy operations which bring few new jobs into the community.

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### *Land Use Element*

The Land Use Element includes a discussion of implementation strategies for the objectives and policies of the element. Land Use Program 2 is particularly relevant for its potential disparities with the Dairy Element. Land Use Program 2 exhorts the County to "[c]onsider changing zone district boundaries, or relying more heavily on administrative review rather than on the conditional use permit process, in order to streamline the planning process. Retain the opportunity for public review and comment on potentially significant projects;" "[r]equire Conditional Use permits of all livestock concentration activities... which are now permitted, or are permitted subject to administrative approval, in agricultural zone districts;" and "[d]o not approve uses for new livestock animal concentrations or nuisance-producing agricultural service industries within areas designated 'Limited Agriculture'" This program is in place to promote the broader objectives of the general plan; however, the Dairy Element would render much of Land Use Program 2 inconsistent with the Dairy Element.

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Land Use Program 2 of the General Plan requires that conditional use permits be obtained for all livestock concentration activities. "Animal concentrations" are defined to include dairies. General Plan at LU-15. The Dairy Element seeks to circumvent this requirement by replacing the conditional use permit process with the ministerial site plan review (SPR). Such a substitution will not achieve the goals of the general plan to guide the future development of Kings County in an orderly manner so as to protect the health, safety, and welfare of Kings County's residents. Land Use Program 2 also insists that the opportunity for public review and comment on potentially significant projects be retained, yet the proposed Dairy Element would require the public to give up its right to participate in the future dairy review process. *Id.*

22-75

Land Use Program 2 also states that new livestock animal concentrations and other nuisance producing agricultural service industries should not be approved within areas designated as "Limited Agricultural" (AL) zones. General Plan at LU-15. The General Plan defines "limited agriculture" as specifically excluding animal concentrations, General Plan Glossary at xv, and "animal concentrations" are defined to include dairies. *Id.* Most AL areas designated in the Kings County Land Use Map (General Plan figure 3) are buffers zones separating urban and residential areas from more intensive agricultural activities. The proposed Dairy Element seeks to render the AL designation meaningless by allowing dairies to be sited in AL zones subject to conditional use permit review. The General Plan is clear on this point: there is no place for animal concentrations in areas that fall under the AL designation.

22-76

Additionally, Land Use Program 2 contains an important amendment to the zoning approvals process in Kings County. The amendment to the Zoning Ordinance eliminates the category of zoning permits granted by administrative approval. Instead, permits are to be granted under one of two review processes: Site Plan Review and Conditional Use Permits. The process for permitting is based on whether the proposed land use is subject to CEQA review: "Generally, those uses which do not require CEQA review should be processed as Site Plan Reviews, and those uses requiring CEQA review should be processed as Conditional Use Permits." General Plan at LU-15. The Dairy Element seeks to revise this general rule in a manner that will make the type of review dependent on the location of the proposed project and not on the environmental impact of the proposed land use.

22-77

Under Land Use Program 11, the County must "[p]repare an Agricultural Element to be integrated with the contents of the Land Use, Open Space, and Resource Conservation Elements." General Plan at LU-16-17. The Dairy Element states no reason why other forms of agricultural production are being ignored. If anything, the county should be required to prepare a comprehensive Agricultural Element as proposed in the General Plan rather than substituting a Dairy Element.

22-78

#### *Resource Conservation Element*

The proposed Dairy Element fails to take the goals and objectives of the General Plan's Resource Conservation Element into account, and as a result adoption of the Dairy Element would make the General Plan internally inconsistent.

Kings County Flood Hazard Areas map (General Plan figure 11) depicts the county's flood prone zones. The areas of the county most vulnerable to flooding include the Kings River floodplain and the Tulare Lake Basin. A comparison of the Flood Hazard map with the proposed Dairy Development Areas map from the PEIR (PEIR figure 3-2) shows that most of the proposed Nutrient Spreading Overlay Zones (NSOZs) correspond with the identified flood hazard areas. As noted above, the Dairy Element permits the application of manure and dairy process water within the flood zones, yet the PEIR fails to consider the potential for unanticipated flooding. Flooding in NSOZs could create potential impacts to surface water quality, and the PEIR fails to reconcile the conflict between the general plan and the proposed Dairy Element on this issue.

22-79

The Dairy Element is also deficient with regard to the county's biological resources. According to the Conservation Element of the General Plan, the county has a duty to protect its biological resources. General Plan at RC-5. Specifically, "projects which result in adverse impacts to listed species must obtain a Fish and Game management permit" from the California Department of Fish and Game. *Id.* Objective 16.1 of the Conservation Element requires "that development in or adjacent to important natural plant and animal habitats be consistent with the preservation of the habitat." *Id.*

22-80

Policy 17b of the Conservation Element states that the county must "[u]se the [CEQA] process to assess wetland resources; require mitigation measures for development which could adversely impact a designated wetland." General Plan at RC-6. The PEIR to the proposed Dairy Element fails to adequately assess the county's wetland resources, and as a result the county can

22-81

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Cont.

propose no mitigation measures, despite the potential for adverse impacts on the county's wetlands.

22-82

Resource Conservation Program 2 requires "environmental assessments to address in detail the effects of proposed projects on affected species or natural areas." General Plan at RC-10. The PEIR fails to address the such effects in any detail, and the proposed Dairy Element illegally attempts to defer such assessments to a time when new dairies would no longer be subject to the public comment and review process.

22-83

The proposed Dairy Element would also lead to inconsistencies between the Dairy Element and the Conservation Element with regards to the General Plan's designation of Scenic Areas (General Plan figure 12). When the map of the county's scenic areas is compared with the proposed Dairy Development Areas map (PEIR figure 3-2) it is clear that the proposed Dairy Element would potentially impinge on the county's designated scenic areas. In particular, the designated scenic areas along the Tule and Kings rivers would be in conflict with the proposed DDOZ West, NSOZ 2 and NSOZ 4.

22-84

The Dairy Element's treatment of riparian environments is also problematic in light of the policies and objectives outlined in the general plan. Riparian environments include the areas surrounding streams or adjacent to other bodies of water, which offer wildlife rich sources of food, water, and shelter. Birds are particularly attracted to riparian environments, and such areas are especially vulnerable to environmental disturbances. Goal 18 of the general plan seeks to "protect and manage riparian environments as valuable resources." General Plan at RC-7. Policies 18a-c are aimed at the protection of the riparian environments adjacent to the Kings River. However, according to the Dairy Element, additional dairies could be established in this biologically sensitive environment.

22-85

**IV. CONCLUSION**

For the foregoing reasons, we urge the County not to approve the Dairy Element until (1) a revised draft program EIR that fully complies with CEQA is prepared and recirculated, and (2) the Element is redrafted in a manner consistent with the Kings County General Plan. To proceed without adopting these measures will place the County's environment and public health at serious risk.

Respectfully submitted,



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## Comments of the Sierra Club on Draft Dairy Element and PEIR

### INDEX OF ATTACHMENTS

1. Communities for a Better Env't v. California Resources Agency (Cal. Super. Ct. Apr. 25, 2001) No. 00CS00300, slip op.
2. Center on Race, Poverty and the Env't v. County of Kern (Cal. Super. Ct. May 3, 2001) No. 242336, slip op.
3. Comments of Alan E. Gay, P.E. on Draft Dairy Element and Program Environmental Impact Report, with February 2001 comments attached.
4. Alan E. Gay, P.E., Dairy Waste Pollution Reduction (May 2001).
5. Curriculum vitae of Alan E. Gay, P.E.
6. Abstracts Book, Workshop on Atmospheric Nitrogen Compounds II: Emissions, Transport, Transformation, Deposition and Assessment (June 1999).
7. California Regional Water Quality Control Board, Dairies and Their Relationship to Water Quality Problems in the Chino Basin (July 1990).
8. Kathy J. Martin, P.E., "Lagoon Seepage and Mass Loading of Pollutants: Calculations for the Borba Dairy, Kern County, California" (July 2000).
9. Stephen D. Arnold, Ph.D., & Edward A. Meister, Ph.D., "Dairy Feedlot Contributions to Groundwater Contamination: A Preliminary Study in New Mexico," Environmental Health (Sept. 1999).
10. Save Our Forest and Ranchlands v. County of San Diego. (Cal. Super. Ct. Aug. 31, 2000) No. 676630, slip op.
11. Eugene Lengerich, David G. Addiss, James A. Marx, Beth L.P. Ungar, & Dennis D. Juranek, "Increased Exposure to Cryptosporidia among Dairy Farmers in Wisconsin," Journal of Infectious Diseases (1999).
12. Jonathan Knight, "Gene tests lift lid on drug-resistance puzzle," Nature (May 31, 2001).
13. William R. Mac Kenzie et al., "A Massive Outbreak of Cryptosporidium Infection Transmitted through the Public Water Supply," New England Journal of Medicine (July 21, 1994).
14. Edward R. Atwill, "Pathogens Excreted by Livestock and Transmitted to Humans though Water," University of California Davis Agricultural Research Center (August 1997)

15. Jane L. Mawdsley et al., "Pathogens in livestock waste, their potential for movement through soil and environmental pollution," Applied Soil Ecology (1995).
16. Jane L. Mawdsley, Alison Brooks & Roger J. Merry. "Movement of the protozoan pathogen *Cryptosporidium parvum* through three contrasting soil types," Biological Fertility of Soils (1996).